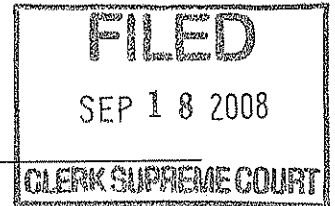


IN THE SUPREME COURT OF IOWA



STATE OF IOWA,	)	SUP. CT. NO.
	)	Dallas Co. No. FECR028426
Plaintiff-Appellant,	)	
	)	
v.	)	
	)	<b>MOTION FOR EMERGENCY STAY OF</b>
PIERRE A. PIERCE	)	<b>RULING ON DEFENDANT'S</b>
	)	<b>APPLICATION TO MODIFY TERMS OF</b>
Defendant-Appellee.	)	<b>PROBATION TO PERMIT TRAVEL</b>

COMES NOW the State of Iowa and requests a stay of the Ruling on Defendant's Application to Modify Terms of Probation to Permit Travel for Pierre Antoine Pierce dated September 10, 2008 which allows Pierce to "travel to France and live there while he is employed to play professional basketball". Ruling on Defendant's Application to Modify Terms of Probation to Permit Travel, p. 6. (Exhibit A). The district court determined that "the conditions of Defendant's probation can be altered to allow him to travel and still achieve the stated purposes of probation, which are to provide maximum opportunity for his rehabilitation and to protect the community from further offenses by him". Id., p. 4. The international travel permission was then reinstated following a brief period in a Ruling on Probation Violation Report dated September 18, 2008. (Exhibit B). The State of Iowa, through the Iowa Department of Corrections, 5<sup>th</sup> Judicial District Department of Correctional Services seeks to stay the ordered conditions of probation allowing international travel and to return Pierce to such conditions which are dictated by his current Iowa probation officer consistent with his rehabilitative needs and objective to protect the community.

1. The underlying controversy stems from the probation supervision of Pierce which was considered by the Iowa Court of Appeals in *State v. Pierce*, 752 N.W.2d 452 (Table), 2008 WL 2039314 (Iowa App. 2008). In that decision, the Iowa Court of Appeals affirmed the denial of Pierce's request to be discharged early from probation. The present action follows that appeal and stems from Pierce's request to be allowed to travel to France to play basketball.

2. There is statutory authority which provides for an individual on probation to have his or her supervision completed in another state. Chapter 907B Iowa Code (2007) *see also Linn County Sheriff v. Iowa District Court for Linn County*, 545 N.W.2d 296 (Iowa 1996) (trial court had authority to grant work release outside county of confinement). However, there is no known statutory authority which would allow an individual probationer to have his or her supervision completed while outside of the United States.

3. The federal authority which limits the ability of Pierce to serve his probation outside of the United States is 18 U.S.C. Section 4100 (2007) which provides:

(a) The provisions of this chapter relating to the transfer of offenders shall be applicable only when a treaty providing for such a transfer is in force, and shall only be applicable to transfers of offenders to and from a foreign country pursuant to such a treaty. A sentence imposed by a foreign country upon an offender who is subsequently transferred to the United States pursuant to a treaty shall be subject to being fully executed in the United States even though the treaty under which the offender was transferred is no longer in force.

(b) **An offender may be transferred from the United States pursuant to this chapter only to a country of which the offender is a citizen or national.** Only an offender who is a citizen or national of the United States may be transferred to the United States. An offender may be transferred to or from the United States only with the offender's consent, and only if the offense for which the offender was sentenced satisfies the requirement of double criminality as defined in this chapter. Once an offender's consent to

transfer has been verified by a verifying officer, that consent shall be irrevocable. If at the time of transfer the offender is under eighteen years of age, or is deemed by the verifying officer to be mentally incompetent or otherwise incapable of knowingly and voluntarily consenting to the transfer, the transfer shall not be accomplished unless consent to the transfer be given by a parent or guardian, guardian ad litem, or by an appropriate court of the sentencing country. The appointment of a guardian ad litem shall be independent of the appointment of counsel under section 4109 of this title.

(c) An offender shall not be transferred to or from the United States if a proceeding by way of appeal or of collateral attack upon the conviction or sentence be pending.

(d) The United States upon receiving notice from the country which imposed the sentence that the offender has been granted a pardon, commutation, or amnesty, or that there has been an ameliorating modification or a revocation of the sentence shall give the offender the benefit of the action taken by the sentencing country.

Id. (emphasis added).

3. The problem in this case is that there is no indication that Pierce is a citizen of France or has otherwise qualified under the provision of the applicable federal statutes. In addition, there may be other restrictions which would prevent Pierce from leaving the United States.

4. Even if there were such authority for an Iowa District Court to allow a probationer to travel to France to pursue employment possibilities, such a determination would be an abuse of discretion. While the district court crafted requirements that Pierce have periodic telephone contacts, make written reports, and travel back to the United States every three months. Ruling on Defendant's Application to Modify Terms of Probation to Permit Travel, p. 5, Pierce still would be in France and his probation supervisor in Iowa.

5. There is a requirement that probation conditions be reasonable. *State v. Valin*, 724 N.W.2d 440, 448 (Iowa 2006). Allowing Pierce to reside in and another county and travel back to Iowa every three months amounts, in reality, to no supervision at all.

6. If Pierce were to violate the terms of his Iowa probation while in France there would be no method to discover such a violation or even monitor his behavior. Even if Pierce were to violate the terms of his probations while in France, or failed to ever return, the State of Iowa would be forced into the expense and efforts of an international extradition to secure his presence in Iowa.

7. The result is that the State of Iowa and the 5<sup>th</sup> Judicial District Department of Correctional Services is required to monitor the behavior of Pierce with no effective means to carry out such supervision. The illusory prospect that supervision can be completed by Pierce checking in via telephone or letter while in another country is an abuse of discretion by the district court.

8. The result is similar to a request by a Wisconsin parolee who brought a civil rights actions against a prohibition against his travel to the Philippines to marry a woman with whom he had corresponded with while he was in prison. In considering such a claim the Seventh Circuit held:

That brings us to the merits of Williams's claims that his constitutional rights to travel and to marry have been violated by Wisconsin. It is true that the Supreme Court has recognized that under various constitutional provisions including the privileges and immunities clauses of Article IV and the Fourteenth Amendment, ordinary citizens have a protected right to interstate travel. See, e.g., *Saenz v. Roe*, 526 U.S. 489, 498-504, 119 S.Ct. 1518, 143 L.Ed.2d 689 (1999). But, like prisoners, see *Meachum v. Fano*, 427 U.S. 215, 224-25, 96 S.Ct. 2532, 49 L.Ed.2d 451 (1976), parolees such as Williams have no right to control where they live in the United States; the right to travel is extinguished for the entire balance of their sentences. See *Alonzo v. Rozanski*, 808 F.2d 637, 638 (7th Cir.1986); *Bagley v. Harvey*, 718 F.2d 921, 924 (9th Cir.1983); see also *Jones v. Helms*, 452 U.S. 412,

419-20, 101 S.Ct. 2434, 69 L.Ed.2d 118 (1981) (explaining that a person who has committed an offense punishable by imprisonment does not have an unqualified right to leave the jurisdiction prior to arrest or conviction).

More fundamentally, international travel is not the same as interstate travel, even for free persons. See, e.g., *Haig v. Agee*, 453 U.S. 280, 306-07, 101 S.Ct. 2766, 69 L.Ed.2d 640 (1981); *Califano v. Aznavorian*, 439 U.S. 170, 176, 99 S.Ct. 471, 58 L.Ed.2d 435 (1978). For persons still subject to the restrictions of parole or its equivalent, this distinction is even more important. To begin with, the state has no inherent right to enforce its criminal laws or restrictions imposed under those laws outside the United States. See Restatement (Third) of Foreign Relations Law §§432(1) (1987). Only with the permission of the foreign country in question may the law enforcement officers of one country exercise powers in another one. *Id.* §§ 432(2). Thus, Williams's suggestion that the State of Wisconsin could just send him to the Philippines in the custody of his parole officer is not a realistic one. A host of formalities, which are out of the control of the State of Wisconsin, would have to be satisfied before such a ploy was effective: the State Department of the United States (and perhaps the Justice Department as well) would need to agree to ask permission for this move from the Filipino authorities, and the latter would have to agree. Wisconsin thus has entirely rational reasons for flatly prohibiting parolees from traveling outside the country.

The fact that the state permits interstate travel under some circumstances for parolees in no way undercuts its rule with respect to international travel. The states are bound together by the federal Constitution, after all, and the Constitution itself contains a number of provisions that ensure the possibility of interstate cooperation in the enforcement of criminal law. The list includes the Full Faith and Credit Clause of Article IV, sec. 1; the Interstate Extradition Clause of Article IV, §§ 2, cl. 2; and the Interstate Compact Clause of Article I, §§ 10, cl. 3. The last of those three is especially relevant, as there is in fact an Interstate Compact for Adult Offender Supervision, which Wisconsin has implemented in Wis. Stat. §§ 304.16. The compact provides a framework for the supervision of adult offenders who are authorized to travel across state lines, “in such a manner as to enable each compacting state to track the location of offenders, transfer supervision authority in an orderly and efficient manner, and, when necessary, return offenders to their original jurisdictions.” *Id.* §§ 304.16(1)(a). Nothing of the sort exists internationally, and indeed, Article I, §§ 10, cl. 1 of the Constitution forbids individual states from entering into any international treaties.

*Williams v. Wisconsin*, 336 F.3d 576, 581-3 (7<sup>th</sup> Cir. 2003).

9. The same result in *Williams* is applicable to the case of Pierce. There is no authority for Pierce to be allowed to travel to France to play basketball.

10. The State of Iowa requests that this Court stay the provisions in the September 10, 2008 Ruling on Defendant's Application to Modify Terms of Probation to Permit Travel and as reaffirmed by the September 12, 2008 Ruling on Probation Violation Report which allowed such international travel as a matter of law. If such a action is not taken to prohibit such action, but a stay is otherwise granted, the State of Iowa will proceed with an application for discretionary review as to the merits of the claim.

WHEREFORE, the State of Iowa requests that the Ruling on Defendant's Application to Modify Terms of Probation to Permit Travel be stayed and that this Court determine that international travel by probationers be prohibited or to allow this question to proceed as an interlocutory appeal.

THOMAS J. MILLER  
Attorney General of Iowa



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ATTORNEYS FOR DEFENDANT

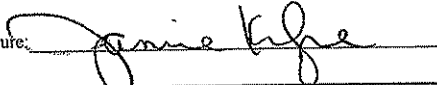
Original filed.

Copy to:

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Dallas County Attorney  
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Adel, Iowa 50003-1492

Alfredo Parrish  
Parrish, Kruidenier, Dunn, Boles,  
Gribble, Cook, Parrish, Gentry  
& Fisher L.L.P.  
2910 Grand Avenue  
Des Moines, Iowa 50312-4205

Dallas County Clerk of Court  
Dallas County Courthouse  
801 Court Street  
Adel, Iowa 50003

Proof of Service	
The undersigned certifies that the foregoing instrument was served upon each of the persons identified as receiving a copy by delivery in the following manner on September 18, 2008.	
<input checked="" type="checkbox"/> U.S. Mail	<input checked="" type="checkbox"/> FAX
<input type="checkbox"/> Hand Delivery	<input type="checkbox"/> Overnight Courier
<input type="checkbox"/> Federal Express	<input type="checkbox"/> Other
<input type="checkbox"/> Electronically	
Signature: 	

## IN THE IOWA DISTRICT COURT FOR DALLAS COUNTY

STATE OF IOWA,

Plaintiff,

vs.

PIERRE ANTOINE PIERCE,

Defendant.

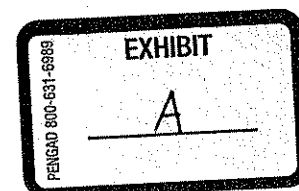
Criminal No. FECR028426

RULING ON DEFENDANT'S  
APPLICATION TO MODIFY TERMS  
OF PROBATION TO PERMIT TRAVELFILED  
DALLAS COUNTY, IOWA  
2008 SEP 10 AM 10:00  
CLERK, DISTRICT COURT

THIS MATTER comes before the Court upon Defendant's, Pierre Antoine Pierce, Application to Modify the Terms of his probation to allow him to travel to France to play in a professional basketball league. A hearing on this matter was held on September 8, 2008, at which the Defendant appeared personally and by his attorney, Alfredo Parrish, and the state of Iowa by Dallas County Attorney, Wayne M. Reisetter. Having considered the written application, the resistance, the testimony elicited at the hearing, the exhibits, and oral arguments of counsel, the Court rules as follows:

## SUMMARY OF FACTS

The background facts and proceedings through March of 2007 are set forth in detail in the decision of the Court of Appeals of Iowa filed May 14, 2008. No further recitation of the prior proceedings is necessary. 2008 WL2039314 (Iowa App.). That decision resulted from this court's denial of Defendant's Application to Discharge him from probation or to modify the conditions of his probation. The Court of Appeals of Iowa affirmed the District Court's finding that the purposes of probation had not been satisfied and Defendant's court-ordered obligations had not been paid. In particular, the Court found it was not unreasonable to require Defendant to participate in and





successfully complete a sex offender treatment program as a condition of his present probation.

On January 22, 2008, a report of violations was filed by Defendant's probation officer which report was supplemented by addendums filed January 22, 2008, and March 20, 2008. The report and addendums set forth violations by the Defendant of his rules of probation including but not limited to violations which took place during a time when Defendant was allowed to travel for the purpose of pursuing his basketball career. A hearing was held on April 18, 2008, at which time Defendant substantially admitted the violations alleged and was found in contempt and sentenced to 30 days in the Dallas County Jail. Defendant served his time in jail without incident and was released.

On July 22, 2008, Defendant filed an "Application to Modify Terms of Probation to Permit Travel." In his application, Defendant asserts that he has an opportunity to play for a professional basketball team in the south of France if he is allowed to travel. He states that the professional team with whom he has contracted, if he is allowed to travel, will make arrangements for him to continue his counseling and will allow him to travel back to the United States for polygraph exams, if necessary. The application further alleges that he has developed a "new, cooperative attitude." The "new, cooperative attitude," refers to a statement by his counselor, Debra Nickerson, PsyD., on July 16, 2008.

The state resists Defendant's application to modify the terms of his probation to allow him to travel based upon his past violations of his supervisory restrictions. The state asserts that to allow Defendant to travel around Europe would deprive the

Defendant of the benefit of sufficient probation supervision to ensure his rehabilitation and safety of the public.

Further Findings of Fact will be made if and when necessary in connection with the Conclusions of Law.

### CONCLUSIONS OF LAW

The Findings of Fact are incorporated herein as Conclusion of Law.

"The purposes of probation are to provide maximum opportunity for the rehabilitation of the Defendant and to protect the community from further offenses by the Defendant and others." Iowa Code § 907.7.

The Judicial District Department of Correctional Services, subject to the approval of the Court, may impose conditions of probation and regulations to promote those purposes. Iowa Code § 907.6.

Defendant has not requested to be discharged from probation. His request is limited to be given authority to travel to Europe to allow him to pursue his basketball career. Although the Court has no reason to question his motive for making the request, it must be determined whether he can be allowed to travel and still be supervised in a manner to ensure fulfillment of the purposes of probation. Defendant has fulfilled his financial obligations but has not completed the sex abuse treatment program and counseling. Neither has he shown a consistent progression toward meeting the ultimate goals of probation, as shown by the violations which led to him being found in contempt and sentenced to 30 days in the Dallas County Jail in April of 2008. On the other hand, his counselor has noted that he developed "a new cooperative attitude" since the time he was released from the Dallas County Jail in May of 2008. Only time will tell whether this will continue.

If the Court denies Defendant's request to travel in order to keep tighter supervision on the Defendant, there is no way to know whether the probation goals have been met until after he is discharged. On the other hand, if he is allowed to travel now like he probably will after he is discharged from probation, there will be time to evaluate his progress and impose consequences if he is not successful, including, but not limited to, imposing the original sentence.

Allowing travel will in essence make it harder on the Defendant to meet his goals. However, he will have the opportunity to be both successful in his chosen career and successfully complete the requirements of his probation. This would be a win-win situation.

This Court is convinced that the conditions of Defendant's probation can be altered to allow him to travel and still achieve the stated purposes of probation, which are to provide maximum opportunity for his rehabilitation and to protect the community from further offenses by him.

The Defendant has approximately two years left on his probation. That is sufficient time to determine whether Defendant is going to continue with the progress and growth that he has shown since he was released from the Dallas County Jail and for the Court to take further steps to enforce compliance, if necessary.

The next question is, what conditions can be reasonably imposed which will best promote the purposes of probation and provide maximum supervision while he is traveling. Because the same level of supervision will not be possible, Defendant should enter into an amended contract with the Fifth Judicial District Department of Corrections which will be modified from his present contract to take into consideration that

Defendant will be traveling and living outside this jurisdiction until June of 2009. The Department shall establish and impose reasonable rules and regulations which will best promote the purposes of probation under the circumstances of this case, which shall include at a minimum the following:

1. Defendant shall continue his counseling as part of the sex offender treatment program and as approved by the Department. It will be up to the Defendant to arrange for that counseling and have a plan approved prior to leaving his present residence. Defendant shall execute any and all releases necessary for his counselor or counselors to make regular periodic reports to the Department.
2. Defendant shall make periodic telephone contact with the Department as deemed appropriate by the Department.
3. Defendant shall make periodic written reports to the Department as deemed appropriate by the Department.
4. Defendant shall, at his own expense, travel back to the United States at three-month intervals from the time of departure, to the location specified by the Department for personal contact with his probation officer and shall submit, at the request of his probation officer, to a polygraph examination.
5. Defendant shall submit to periodic substance abuse tests as deemed appropriate by the Department.
6. Defendant shall designate a contact person employed by his employer who will have regular personal contact with Defendant and who will have full authority to provide any and all information requested by the Department throughout the time that Defendant is permitted to travel.

IT IS THEREFORE ORDERED that Defendant's Request to travel to France and live there while he is employed to play professional basketball is granted.

IT IS FURTHER ORDERED that the request to travel and live in France shall terminate when he is no longer employed under the present contract that he has entered into, when he is no longer able to play as a result of injury or otherwise, even though still under contract, or until June 15, 2009, whichever occurs first.

IT IS FURTHER ORDERED that Defendant's authority to travel as provided herein is conditioned on him entering into a modified probation contract approved in writing by the Department prior to his departure, which shall include, at a minimum, the following:

1. Defendant shall continue his counseling as part of the sex offender treatment program at the same level. It will be up to the Defendant to arrange for that counseling and have a plan approved prior to leaving his present residence. Defendant shall execute any and all releases necessary for his counselor and counselors to make regular periodic reports to the Department.
2. Defendant shall make periodic telephone contact with the Department as deemed appropriate by the Department.
3. Defendant shall make periodic written reports to the Department as deemed appropriate by the Department.
4. Defendant shall, at his own expense, travel back to the United States to the location specified by the Department for personal contact with his probation officer and shall submit, at the request of his probation officer, to a polygraph examination.

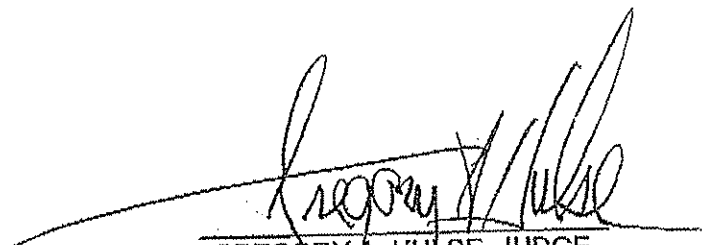
5. Defendant shall submit to periodic substance abuse tests as deemed appropriate by the Department.

6. Defendant shall designate a contact person employed by his employer who will have regular personal contact with Defendant and who will have full authority to provide any and all information requested by the Department throughout the time that Defendant is permitted to travel.

IT IS FURTHER ORDERED that supervision of the Defendant shall be transferred back to the Iowa Department of Corrections at the time when Defendant leaves his residence in Illinois to travel to France.

IT IS FURTHER ORDERED that when Defendant returns from France in June 2009 or earlier, as provided in this order, he shall immediately turn his passport over to the Dallas County Clerk of Court to be held until further order of court.

Dated this 10<sup>th</sup> day of September 2008.

  
GREGORY A. HULSE, JUDGE  
Fifth Judicial District of Iowa

Original filed.

Copies to:

Alfredo Parrish *led by MM*  
2910 Grand Avenue  
Des Moines, IA 50312

09/10/08 13:27 FAX 515 993 6991

DALLAS CO CLERK OF COURT

009

Wayne Reisetter *faxed by mm*  
Dallas County Attorney

FILED  
IN THE IOWA DISTRICT COURT FOR DALLAS COUNTY

08 SEP 18 AM 11:45

STATE OF IOWA, CLERK, DISTRICT COURT

Plaintiff,

v.

PIERRE ANTOINE PIERCE,

Defendant.

Criminal No. FECR028426

RULING ON PROBATION  
VIOLATION REPORT

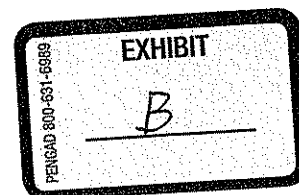
THIS MATTER came before the Court on September 15, 2008, on a probation violation report filed on September 11, 2008. The Defendant appeared in person and by his attorney, Alfredo Parrish. The state appeared by Dallas County Attorney, Wayne Reisetter. Also present was Defendant's secondary case manager, Ty Castle. The hearing was conducted by the judge who granted probation.

The purpose of the hearing was for an initial appearance/scheduling conference. Prior to commencement of the proceedings, the parties stipulated that they were prepared to present evidence to the court and that the hearing on the question of revocation of probation should commence without further delay.

#### FINDINGS OF FACT

1. On October 28, 2005, Defendant was adjudged guilty of Burglary in the Third Degree in violation of Iowa Code § 713.6A and sentenced to an indeterminate term in prison not to exceed five years<sup>1</sup>. Said sentence was suspended and Defendant

<sup>1</sup> Defendant was also convicted of Assault with Intent to Commit Sexual Abuse, in violation of Iowa Code § 709.14, and False Imprisonment, in violation of Iowa Code § 770.7, and Criminal Mischief in the Fourth Degree, in violation of Iowa Code § 716.6.





placed on probation for a period of five years under supervision of the Fifth Judicial District Department of Corrections.

2. Defendant entered into a probation contract which provided in part that he would follow any treatment conditions imposed by the supervising agent, including but not limited to anger management classes and sex offender treatment. Defendant was subsequently ordered to participate in and complete a sex offender treatment program. In connection therewith Defendant agreed to attend all treatment sessions on time and notify an appropriate staff member as soon as possible about any situation that would affect his attendance or promptness. The contract further provided that Defendant understood that the only acceptable excuse for absence or lateness is a verifiable medical emergency.

3. On July 22, 2008, Defendant filed an "Application to Modify Terms of Probation to Permit Travel." Defendant asserted that he had an opportunity to play for a professional basketball team in the south of France if he was allowed to travel. The state resisted the Application to Modify the terms of his probation to allow him to travel and a hearing was scheduled for September 8, 2008.

4. On September 8, 2008, hearing was held on Defendant's application to modify the terms of his probation to allow him to travel. Following the completion of the evidence and arguments of counsel, the Court dictated its Findings of Fact and Conclusions of Law into the record in the presence of the Defendant. The Court subsequently indicated to counsel that it would file a written ruling.

5. The Court conditioned Defendant's authority to travel on him entering a modified probation contract approved in writing by the department prior to his departure, which was to include, at a minimum, the following:

1. Defendant shall continue his counseling as part of the sex offender treatment program at the same level. It will be up to the Defendant to arrange for that counseling and have a plan approved prior to leaving his present residence. Defendant shall execute any and all releases necessary for his counselor or counselors to make regular periodic reports to the Department.

2. Defendant shall make periodic telephone contact with the Department as deemed appropriate by the Department.

3. Defendant shall make periodic written reports to the Department as deemed appropriate by the Department.

4. Defendant shall, at his own expense, travel back to the United States to the location specified by the Department for personal contact with his probation officer and shall submit, at the request of his probation officer, to a polygraph examination.

5. Defendant shall submit to periodic substance abuse tests as deemed appropriate by the Department.

6. Defendant shall designate a contact person employed by his employer who will have regular personal contact with Defendant and who will have full authority to provide any and all information requested by the Department throughout the time that Defendant is permitted to travel.

6. In compliance with his rules of probation, and around the time relevant to these proceedings, Defendant was attending counseling sessions once a week with Debra F. Nickerson, PsyD., a licensed clinical psychologist. His last counseling session prior to the hearing on September 8<sup>th</sup> was on September 3, 2008. At that session, Defendant notified the counselor that he was seeking permission to travel to France and that a hearing was going to be held on the following Monday. He further indicated that if he was given authority to travel, that he hoped to leave within a few days. Dr. Nickerson testified that based on that information, she told him that if he did receive authority to travel, that she would not see him again. She further testified that the reason for telling Defendant that she wouldn't be seeing him any more is because she didn't think he would be staying in the area long enough to attend any more appointments.

7. It is undisputed that Defendant had an appointment to see Dr. Nickerson on September 10<sup>th</sup> to continue his treatment. It is unclear whether that appointment was made on September 3, 2008, or whether that had been scheduled in advance of September 3, 2008, as a part of Defendant's ongoing treatment plan.

8. On September 10, 2008, Defendant made a telephone call to Dr. Nickerson and advised her that he was leaving for France in three-four days, "so he is done with treatment." He thanked her for helping him. Following that telephone call, Dr. Nickerson e-mailed the information to Laura Skach, Defendant's probation supervisor in Illinois. Officer Skach subsequently relayed the information to Ty Castle and asked for further direction on how to proceed with the Defendant. At that time Officer Skach had

not yet received any official information regarding Defendant's permission to leave the country and go to France.

9. Defendant testified in his own behalf. He reiterated the conversation with Dr. Nickerson on September 3, 2008. He stated that it was his understanding that if he received permission to travel, that he would not be going to any more appointments with Dr. Nickerson. He further testified that he did in fact call Dr. Nickerson prior to his appointment to let her know that he would not be attending. He admitted that he had not checked with his probation officer to see if he needed to continue going to the appointments with Dr. Nickerson until he was allowed to leave for France but rather he was simply relying on the statement Dr. Nickerson made on September 3, 2008.

10. On or about September 11, 2008, Defendant received notification of the filing of the report of violation based upon him cancelling his appointment with Dr. Nickerson on September 10, 2008. He immediately rescheduled the appointment with Dr. Nickerson for September 12, 2008. He attended that appointment and has a further appointment scheduled for September 17, 2008.

11. Further Findings of Fact will be made if and when necessary in connection with the Conclusions of Law.

#### **CONCLUSIONS OF LAW**

The Findings of Fact are incorporated herein as Conclusions of Law.

A probation revocation proceeding is a two-step process. The first step is to determine whether the person on probation has in fact acted in violation of one or more rules or conditions of probation. If it is determined that the person did violate the rules or condition of probation, the Court must then determine the disposition. These two

matters can be combined in one hearing. *State v. Tech*, 240 N.W.2d 658, 661 (Iowa 1976); *Rheuport v. State*, 238 N.W.2d 770, 773 (Iowa 1976). This procedure has been approved by statute unless prejudice would result there from. See §908.11, the Code, 2007.

The requisite degree of proof in a revocation proceeding is a preponderance of the evidence. *Rheuport* at 772. Strict rules of evidence in criminal trials do not apply. *Rheuport* at 772.

It is undisputed that Defendant violated the rule of probation which required him to attend his counseling session on September 10, 2008. He had no official authority to cancel that appointment and he had no medical excuse. However, it is also undisputed that Dr. Nickerson indicated to Defendant that if he got permission to travel, that she would probably not be seeing him again. Her statement was based on Defendant's indication to her that if he got permission to travel, he would be leaving within a few days. After the Court ruled that he would be able to travel, Defendant called Dr. Nickerson prior to his next appointment on September 10, 2008, and told her that he had been given permission to travel and that he would not be seeing her again. This was consistent with the conversation that he had with Dr. Nickerson on September 3, 2008. On the other hand, it must be conceded that Defendant's own time table for leaving was not realistic in light of the conditions that had been imposed by the Court. He had not yet entered into a modified probation contract or secured his passport or submitted a treatment plan satisfactory to the department to be followed while he is in France.

Having concluded that Defendant technically violated the rules of probation, the Court must determine the disposition. The Court could continue the probation and alter the conditions of probation, including denying Defendant's previous authority to travel, hold the Defendant in contempt of court and sentence him to jail time while continuing probation, order the Defendant to be placed in a violator facility while continuing probation, or require the Defendant to serve the sentence imposed. § 908.11(4), the Code (2007).

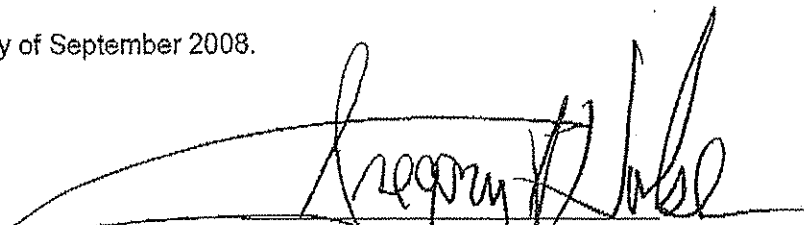
In determining the appropriate disposition, it is necessary to consider any mitigating circumstances. Those circumstances in this case involve reliance by the Defendant on Dr. Nickerson's statement that in the event that he was allowed, to travel, that she would not be seeing him again. There is no evidence that Dr. Nickerson intended to alter Defendant's conditions of probation by making that statement, but it appears she was simply relying on Defendant's statement to her that he would be leaving within a few days and realizing that there would probably not be time for any further appointments with her. Defendant apparently took her at her word and was of the impression that he would be leaving in a few days, even though his excitement for going obviously clouded his thinking because the conditions imposed by the Court to be met before he could leave would take more than a few days, possibly weeks.

The Court concludes that the cancellation by the Defendant of his counseling appointment on September 10, 2008, was not a willful violation, but simply a miscommunication. Defendant did not ignore his appointment but rather remembered it and called and cancelled based upon his conversation with Dr. Nickerson a week earlier. The previous orders of the Court should not be changed except to advise the

Defendant and make it perfectly clear that all conditions of probation remain in effect until he enters into a new probation contract. Thereafter, his rules and conditions of probation will be guided by the new contract. Defendant's authority to travel is reinstated pursuant to the Court's order entered September 10, 2008.

SO ORDERED.

Dated this 18th day of September 2008.



GREGORY A. HULSE, JUDGE  
Fifth Judicial District of Iowa

Original filed.

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